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TAGS: [EMIN](#) [CASC](#) [SENV](#) [EINV](#) [PHUM](#) [ID](#)
SUBJECT: RICK NESS TESTIFIES IN NEWMONT CASE THIS WEEK

REF: 05 JAKARTA 02757 (GOI MOVES RAISE NEWMONT

CONCERNS)

Classified By: Resources Officer Kurt van der Walde, reason 1.4 (b) and (d)

¶1. (C) Summary. Newmont mining executive and Amcit Richard Ness is scheduled to take the stand in his own defense this week on August 25 in a Manado, North Sulawesi courthouse. He faces fifteen years in prison if convicted on charges of polluting Buyat Bay, the site of the now-closed Newmont Minahasa Raya (NMR) gold mine in North Sulawesi. Over the past year, Newmont has offered a vigorous defense, making full use of copious amounts of hard scientific evidence. They have convincingly rebutted each spurious contention made by the prosecution. The lack of firm evidence of a crime and the highly questionable manner in which the prosecution has conducted itself make the potential consequences for Ness all the more serious. Ness and the NMR defense team are under no illusions, however, that having the facts and the law on their side will lead to an acquittal. They continue to believe the verdict will be decided in Jakarta based on political calculations. The weakness of the case and the strong political pressure GOI elements have reportedly exerted on the judges raise troubling questions about the respect for the rule of law and contract sanctity in Indonesia. A verdict may be handed down in October. Representatives from the Embassy or Consulate General Surabaya have attended all but one of the approximately 40 trial sessions. End Summary.

NMR,s Defense: No Credible Evidence of Pollution

¶2. (C) Newmont has been clear in its defense since the allegations of environmental damage began to percolate in 2004 as the mine prepared to close. First, NMR argued that they complied with the terms of their contract of work at all times, at times exceeding what was required by the contract. Second, they argued that they adhered to the highest standards of environmental stewardship and met or exceeded all requirements under their environmental permit. In plain terms, Newmont argued that no reputable scientific evidence existed to indicate that the environment and waters of Buyat Bay are polluted. The prosecution has continued to point to one deeply flawed water sampling by the Indonesian police as evidence of pollution. After a year of trial testimony, the prosecution has been unable to offer any credible scientific

evidence of environmental pollution in Buyat Bay. No other scientific investigators have been able to reproduce results consistent with those of the police water sample. All other samples of water from the bay, including those by respected international laboratories have concluded that the water in and around Buyat Bay is cleaner than that off the coasts of California, Japan, England, and Australia.

¶3. (C) Newmont,s lawyers and scientific experts decisively rebutted a second important prosecution charge that NMR,s operations damaged the coral reef in the bay. Color underwater photographs, time and date stamped from the week of June 5 and introduced into evidence during the hearing that same week, showed a vibrant and thriving undersea environment. A marine biology expert witness for the defense testified that the coral reefs were robust in the bay. The only damage he found was caused by the local villagers who had made a practice of fishing with explosives. In contrast, the prosecution offered no expert witness to support their claims. Nor were they able to challenge the testimony of the NMR expert witness.

¶4. (C) The prosecution made much of the fact in early sessions that Newmont never received a permanent environmental permit from the Environment Ministry for its Sub-sea Tailings Placement (STP) method to dispose of mine tailings. In testimony on June 14, Environment Ministry staff, testifying for the prosecution, admitted that the company had been granted a contract of work by the GOI that specifically included plans for STP. They also admitted that an inter-agency GOI committee had approved the company,s environmental impact study, which also included the STP program. They further testified that the entire program of environmental permits had only been introduced in 2000 and included a five year grace period for mines already in operation. The Environment Ministry staff acknowledged that the Newmont mine ceased operations in 2004.

Death of &Baby Andini8 Re-examined

¶5. (C) The NMR defense team also knocked back the prosecution,s most inflammatory allegation: that the pollution in the bay contributed to the death of an infant, christened in the local and international press as &Baby Andini.8 The infant,s death received sensational headlines in Indonesia and was widely reported internationally by the New York Times as having been caused by a &mystery illness.8 NGO activists originally claimed that the baby died from Minimata Disease, which is caused by severe mercury poisoning. Scientific evidence soon showed that that mercury levels in the bay were nowhere near those required to induce the malady. The prosecution and NGO activists then alleged that the pollution in the bay had caused the baby to suffer from severe dermatitis, spawning massive infections, which ultimately killed the baby.

¶6. (C) At the June 2 hearing, Dr. Sandra Rotty, head of the local rural health clinic, testified that the infant did suffer from a common form of dermatitis prevalent among ten percent of the local population. She said the condition was easily treatable with widely available medicine, which she provided to the family at no cost. She said she also later referred Andini and her parents to Dr. Winsy Warouw, head of the dermatology at the local university medical school, when the baby did not seem to be responding to the medication. Dr. Winsy confirmed that Andini,s condition was curable with common antibiotics. Winsy testified he had wanted the baby admitted to the hospital at no cost to the parents. He said Andini,s mother originally consented to admit the baby to the hospital only to reverse herself after consulting with her NGO benefactors. Rotty testified she made a home visit to examine Andini a few days before her death and that the dermatitis had spawned an upper respiratory infection. Rotty again provided the appropriate medicine, again at no charge. After the baby,s death, Rotty said she returned to Andini,s home and found her original and most recent prescriptions both unused. Rotty said Andini,s mother told her that she

withheld the medication on advice of her NGO benefactors. Winsy testified that the baby's original dermatitis was caused by poor nutrition and hygiene, not toxic poisoning.

Friction Between Newmont,s Attorneys

¶17. (C) Perhaps the only discordant note for NMR has been the occasional friction between its Indonesian lawyers and expatriate legal counsel over the tone and tactics the company should adopt in exposing GOI misconduct and confronting powerful political actors publicly and in the media. The company,s American and Australian lawyers have chafed occasionally at what they perceive to be timidity on the part of the Indonesian lawyers in their reluctance to criticize GOI ministers and President Susilo Bambang Yudhoyono (SBY). In particular, the expats became highly exercised when the local lawyers chose to de-emphasize video of then Energy and Mineral Resources Minister SBY,s visit to the Buyat Bay mine site in 2000. The video shows SBY complimenting NMR executives for their environmental stewardship and community development practices, while also commenting on the pristine nature of the bay. The defense did show the video in court in an abbreviated form, but chose not to release the video to print and television reporters who would have given it wide national exposure. The Indonesian lawyers argued that any victory in the court of public opinion would have been far outweighed by such a public loss of face for SBY.

¶18. (C) However, in general Newmont,s expatriate lawyers have expressed a high degree of satisfaction with the quality of the Jakarta-based local lawyers who lead the defense. They take a decidedly dimmer view of the company,s Manado-based lawyers.

The Prosecutorial Circus

¶19. (C) Throughout the one year trial, the prosecution has had no discernable, coherent legal strategy. The chief prosecutor has made a practice of staying away from the hearing when the defense,s most embarrassing witnesses are to testify. In the early part of the trial villagers from Buyat Bay testified for the prosecution. Bizarrely, the prosecutors evidently decided that it might be a good strategy to seek to berate and intimidate their own witnesses, who were already clearly uncomfortable and nervous. The intimidation resulted in confused and contradictory testimony by the villagers and in one case tears.

¶10. (C) On March 31, the prosecution called Professor Muladi, Justice Minister during the Suharto era and State Secretary under President Habbibe, to testify for reasons they never made quite clear. He swept into the courtroom almost an hour late with a retinue that included Environment Minister Witoelar and several prominent members of the Attorney General,s staff, all of whom flew in with him from Jakarta. Rather than speak to the facts of the case, Muladi embarked on a long-winded disquisition on the nature of constitutional law in Indonesia. At the end of his ninety minute lecture, he announced that he had to catch a plane back to Jakarta and would not be able to stay around to be questioned by the defense. The chief judge was dismayed but still deferential and inquired whether Muladi would be available to return the following week. Muladi said he would try to return but could make no promises, and he, in fact, did not return. Under Indonesian law his testimony cannot be part of the final record since the defense never had a chance to cross-examine him.

¶11. (C) Former Environment Minister and current DPR member Sonny Keraf was equally unresponsive during his testimony on January 27. He faced intense questioning from the defense on the technical data and policy actions surrounding the decision to bring criminal charges against NMR. Keraf was unresponsive on virtually every question, responding with

variations on the following: &I just did what my staff told me to do. I didn,t concern myself with the scientific or legal details. Ask my staff.8 Even the prosecutors stumped their own witness. At one point the chief prosecutor asked the former minister to detail through what means the Environment Ministry informed NMR that they were to cease STP in Buyat Bay. Keraf looked perplexed and said, &I don,t know. Ask my assistant.8 After a pause he said, &We told them in many ways, many ways.8

¶12. (C) NMR lawyers and executives were particularly pleased on March 3 when NMR was able to confront its principal accuser, Dr. Rignolda Djamaludin, a professor at Sam Ratulangi University. Rignolda has been the leading NGO activist in Indonesia against the Denver-based mining giant since NMR began operations in Buyat Bay in 1994, according to NMR executives. The prosecution called Rignolda as an expert scientific witness. Although he is a marine biologist he offered supposedly expert testimony on medicine, chemistry, toxicology, oceanography, fisheries, and sociology. At one point a clearly exasperated chief judge asked him, &So now you,re an expert on coral reefs, too?8 Newmont lawyers used skillful questioning to bring Rignolda,s claims to any sort of scientific expertise into doubt. They asked him during cross-examination to name and explain the two principal methods of scientific investigation (inductive and deductive reasoning). Rignolda paused for several moments before replying, &Well, there,s aerial photography and water sampling.8

Comment

¶13. (C) Throughout the ordeal, Rick Ness and other NMR officials have been clear in their belief in their innocence on legal and scientific grounds. They have taken little solace in the strong case they have presented, however. Ness has told us repeatedly that he believes the trial will be decided based on political factors. Our early conversations on this case with key presidential advisor Dino Djalal (reftel) left no room for doubt that political calculations would weigh heavily in the verdict. The GOI has always told us that any outcome in the case had to prove politically defensible. According to Ness, the prosecution,s decision to defy the chief judge,s July 28 order to re-sample the water of Buyat Bay reflects their confidence in the political backing they enjoy from Jakarta. NMR local counsel told us that none of them could ever recall a similar act of defiance by a prosecutor in a criminal case. NMR did comply with the judge,s order and their results were consistent with all the others that showed the bay to be in pristine condition.

¶14. (C) Even if Ness were not facing 15 years in prison, the nature of the proceedings and the weakness of the prosecution's case raise troubling concerns for the sanctity of contracts in Indonesia and the rule of law. Ness expects a verdict in October, barring further delays, though they have been frequent in this trial. Ness is well known in Indonesia and a former Vice President of AmCham, and a guilty verdict would very likely be a severe blow to the investment climate in Indonesia and a setback to the GOI,s attempts to lure foreign investment. Even an acquittal is not a foregone winner for the GOI,s investment drive. The length and cost of the trial (Newmont tell us that their defense is costing them USD 12 million per month for the last 18 months) may have a chilling effect on potential foreign investors for years to come, regardless of the trial result.

¶15. (S/NF) On the margins of the trial, we have picked up oblique references from NMR executives that they have prepared contingency plans in the event of Ness,s final conviction. In social settings after the hearings in Manado, they have given hints that Newmont has engaged a private security firm to smuggle Ness out of the country if he is convicted after all appeals have been exhausted. Given the lack of even the most basic evidence that any crime was committed, and the clear political overtones in the decision to bring the case to trial, Newmont executives give the

impression of feeling justified in spiriting Ness out of the country so that he does not spend a day in jail.
PASCOE